proved by expert evidence'. Encik Gill also sought reliance on *Lin Securities (Pte)* v *OSK & Partners Sdn Bhd*[2] where the question arose as to whether Malaysian or Singapore law applied in respect of the contract on which the plaintiffs sued. Thean J refrained from expressing any opinion on that since he was of the view that that would be an issue to be tried at the trial. I agree with Cik SM Yoong of counsel for the plaintiffs that that expression of his view on the matter was made by Thean J obiter and has no direct relevance to the situation obtaining in the issues before this court in this appeal. But that case does teach that the question of whether foreign law applies or not could itself be an issue to be tried.

Cik Yoong also contended that there is a presumption that foreign law is identical to Malaysian law and that it was for the defendants to show that there was a difference between the laws of Malaysia and Singapore on the point. She cited *Ertel Bieber* v *Rio Tinto Co Ltd*[3] and *Lloyd* v *Guibert & Ors*[4] and also referred to 8 *Halsbury's Laws of England*, 4th Ed, pp 511/512 and Vol 36, pp 32/33.

As far as Malaysian law is concerned I am not aware that a forward contract or an off-market contract is illegal. But it was brought to the attention of the court without challenge that the Singapore Stock Exchange had released a directive to the effect that such contracts are prohibited. If that prohibition has the weight of law in Singapore and if Singapore law is relevant then the presumption that Cik Yoong referred to if not unrebutted has certainly been watered down. Cik Yoong highlighted the proviso to the press release of 2 December 1985 but a further question that arises is the effect of that proviso in the face of the terms of the press release of 4 December 1985 – is the press release of 4 December to be read with that of 2 December or has the 4 December directive superseded the earlier? Cik Yoong also referred me to the effect of s 66 of our Contracts Act 1950. However, is that section relevant if the law to be applied is Singapore law?

I have anxiously and carefully gone over the submissions that were made by learned counsel as well as the cause papers again and again and have to conclude that there are far too many questions to be dealt with in this matter, some of which are difficult questions of law. One such question is whether Singapore law applies. If it does then that alone provides sufficient cause to deny the plaintiffs summary judgment. The appeal is allowed. The O 14 judgment is set aside. The defendants are given unconditional leave to defend.

Appeal allowed.

Solicitors: *Gill Cheah & Co*; *Shook Lin & Bok*.

Reported by *Ng Sheau Jiuan*

Bank Bumiputra Malaysia Bhd v Kredin Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C3843 OF 1985
VC GEORGE J
27 MAY 1988

Civil Procedure – Default judgment – Application to set aside – Defendant permitting default judgment to be entered on erroneous advice of solicitor – Whether an acceptable explanation – Whether O 14 r 11 of the Rules of the High Court 1980 can be successfully invoked – Rules of the High Court 1980, O 14 r 11

Civil Procedure – Default judgment – Application to set aside – Lapse of 14 months between date of default judgment and date of application to set aside – Application not entertained unless acceptable explanation for delay given

Civil Procedure – Default judgment – Application to set aside – No bona fide triable issues raised

Banking – Charge on land given as security for loan – Whether security a full and final recourse and indemnity in respect of loan – Whether guarantee given was ancillary to security – Terms of loan agreement and letter of guarantee to be looked at

The plaintiff claimed against the first defendant in respect of a loan made to it by the plaintiff and against the second defendant as guarantor of the first defendant. On 23 January 1986, the day of the hearing, both the defendants and their solicitors, although served with the writ, were absent and the plaintiff obtained summary judgment against each of them. Subsequently, on 14 March 1987, the defendants filed their application under O 14 r 11 of the Rules of the High Court 1980 to have the judgments entered against them in their absence set aside. The defendants' explanation for their having allowed summary judgment to be entered against them without opposing it was that their then solicitors had advised them that they had no defence to the plaintiff's claim.

In the first part of the proposed statement of defence filed in support of their O 14 r 11 application the defendants contended that: (a) the plaintiff accepted a third party second charge on certain lands in Klang as a full and final recourse and indemnity in respect of the loan, (b) the second defendant's guarantee was ancillary to the security provided by the second charge, (c) the plaintiff had accepted the security in accord and satisfaction of the loan. The second part of the defence contended that it was harsh and unconscionable for the plaintiff to sue the defendants after having issued a National Land Code Form 16D notice. It was also submitted that as the first chargee of the lands in Klang had already foreclosed and obtained an order for sale, and the plaintiff had failed to take any further step to realize the security after having served their Form 16D notice, the plaintiff had lost the security and consequently the second defendant's guarantee was null and void.

Held, dismissing the application:

(1) Order 14 r 11 of the Rules of the High Court 1980 allows the court to set aside a judgment entered under O 14 given against a party who does not appear at the hearing. However, r 11 cannot be invoked successfully where the defendant had directed his mind to the application and had deliberately decided to allow summary judgment to be taken against him. It is as if a consent judgment had been entered and unless a defendant can bring the matter more or less within the terms

in which a consent judgment can be set aside, he would not succeed in his application.

(2) The position would be different if judgment was allowed to be entered by inadvertence or a misappreciation of the position. In the present case, a defendant permitting default judgment to be entered against him on the erroneous advice of a solicitor does not come within the category of inadvertence or even a misappreciation of the position.

(3) In any event, the court will not entertain an application to set aside a default judgment after a lapse of 14 months unless an acceptable explanation for the inordinate delay is given. The defendants have not come up with any acceptable explanation as to the delay.

(4) Section 3.01 of art III of the loan agreement between the first defendant and the plaintiff, and cl 3(i) of the letter of guarantee put it beyond argument that the three contentions in the first part of the defence had no merits.

(5) As to the second part of the defence, the fact of the matter is that apart from issuing the Form 16D notice, the plaintiff has not pursued with foreclosure. Accordingly, the harsh and unconscionable contention is misconceived. As to the complaint that the plaintiff had allowed the security to be lost, there is cl 3(ii) of the guarantee by which the guarantor has expressly agreed that the neglect to enforce a security shall not affect the guarantor's liability to pay up on demand. Furthermore, to contend that the second charge had thereby lost the security (when the first chargee had in fact foreclosed the property) is entirely without merit in the face of the terms of s 268 of the National Land Code 1965 which provides for the payment of moneys realized from a sale pursuant to a foreclosure action in respect of charges subsequent to the charge on which there was a foreclosure.

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 245 of 1988.]

Legislation referred to
National Land Code 1965 s 268, Form 16D
Rules of the High Court 1980 O 2 r 2, O 14 r 11

RJ Manecksha for the defendants/applicants.
HY Too for the plaintiff/respondent.

Cur Adv Vult

VC George J: The writ was served on the defendants, sometime in August on one and in early September on the other, in 1985 and after appearance O 14 proceedings were commenced against both defendants. The summons came on for hearing on 23 January 1986. The claim against the first defendant was in respect of money advances by way of a loan the plaintiff bank had made to it and interest and costs and that against the second defendant was as guarantor of the first defendant for the repayment of what was due to the bank. Both the defendants (and their solicitors), although served, were absent and the plaintiff obtained liberty to enter judgment against both the defendants pursuant to which, judgment dated 23 January 1986 was entered against each of the defendants.

In November 1986 the plaintiff served a statutory notice pursuant to s 218(2)(a) of the Companies Act 1965 on the first defendant demanding the amounts due under the judgment. It was also in November 1986 that the plaintiff served a bankruptcy notice on the second defendant based on the amount due under the judgment. In spite of those notices nothing was seen to be done by either of the defendants in respect of the judgments entered against them or in respect of the notices until 14 March 1987 when each of the defendants filed their application to have the judgments entered against them in their absence set aside.

The defendants' explanation for their having allowed O 14 judgment to be entered against them without opposing it was that their then solicitors had advised them that they had no defence to the plaintiff's claim. They say that after the s 218(2)(a) notice and the bankruptcy notice had been served on each of them respectively they consulted other solicitors who have advised them that in fact they had a defence to the action.

Order 14 r 11 of the Rules of the High Court 1980 allows the court to set aside a judgment entered under O 14 given against a party who does not appear at the hearing. However, in my view, r 11 cannot be invoked succesfully where the defendant had directed his mind to the application and had deliberately decided to allow summary judgment to be taken against him. Having in effect conceded to the right of the plaintiff to enter summary judgment against him, normally he would not be allowed to invoke r 11 to have the judgment set aside. It is as if a consent judgment had been entered and it seems to me that unless a defendant can bring the matter more or less within the terms in which a consent judgment can be set aside, he would not succeed in his application. The position could be different as other considerations would apply if judgment was allowed to be entered by inadvertence or a misappreciation of the position. However, in the context, that a defendant permitted default judgment to be entered against him on the erroneous advice of a solicitor does not come under the category of inadvertence or even a misappreciation of the position. In any event the court should not and will not entertain such an application after a lapse of 14 months from the defendants allowing judgment to be entered unless an acceptable explanation for the inordinate delay is given. It must be remembered that even an application to set aside for irregularity has to be made within a reasonable time (see O 2 r 2) and it must be even more so where the application is to set aside an order that was regularly obtained. Here the defendants have not come up with any acceptable explanation as to the delay.

Even if I am wrong in what I have stated to be the approach the court should take in an O 14 r 11 applica-

tion of this type, there is one other and more telling reason why each of these defendants cannot succeed in this application and that is that they have not been able to show that they have a defence on the merits.

A proposed statement of defence was exhibited to the affidavit encl 30 filed in support of the O 14 r 11 application.

Apparently as security for repayment of the loan the first defendant had provided the bank with a third party second charge on certain lands in Klang, the first charge thereon being in favour of another bank. In effect the first part of the defence is that the plaintiff is estopped from suing the defendants until they have foreclosed because of any one of the following three reasons:

(i) the plaintiff accepted as security for the loan given to the first defendant the second charge on the lands in Klang as a full and final recourse and indemnity in respect of the loan;
(ii) the guarantee by the second defendant was ancillary to the security provided by the second charge;
(iii) the plaintiff had accepted the security in accord and satisfaction of the loan.

The other part of the defence is that having issued a National Land Code Form 16D notice the defendants contend that it is harsh and unconscionable for the plaintiff to sue. In any event the defendants contend that the first chargee of the lands in Klang had foreclosed and obtained an order for sale on 26 March 1985 and the plaintiff although having served their Form 16D notice on 28 June 1985 had failed or neglected to take any further step to realize the security. This has the effect, it is contended, that the plaintiff has lost the security and consequently the letter of guarantee by the second defendant is null and void and of no effect or is discharged.

Now, section 3.01 of art III of the loan agreement entered into between the first defendant and the plaintiff is as follows:

> Section 3.01 *Covenant relating to additional securities*
>
> In consideration of the bank granting the term loan the borrower shall, in addition to this agreement, cause the following to be done on or before the execution of this agreement:
>
> (a) cause UMS Industries Sdn Bhd, a company incorporated in Malaysia with its registered office at Room 808, 8th Floor, Sun Complex, Jalan Bukit Bintang, Kuala Lumpur (hereinafter called 'UMS') to create a second charge in favour of the bank over the land held under State Lease 4385 Lot 17696 in the Mukim and District of Klang (hereinafter referred to as 'the UMS land');
> (b) cause the following person, namely, Datuk Mohammed Salleh Bin Mohammed Yusof (NRIC No 2132778) to execute a guarantee in favour of the bank for the repayment of the term loan and all other moneys secured hereunder as well as the due performance of all the other terms and conditions herein contained.

Clause 3 of the letter of guarantee is as follows:

> 3 This guarantee shall be without prejudice to and shall not be affected (nor shall I/we or any of us be released or exonerated) by any of the matters following:
>
> (i) any securities negotiable or otherwise including other guarantees which you may now or any time hereafter hold from the customer or any other person or persons in respect of any money hereby guaranteed;
> (ii) the variation exchange renewal release or modification of any such securities or the refusal or neglect to complete enforce or assign any judgment specially or other security or instrument negotiable or otherwise and whether satisfied by payment or not;
> (iii) your refusal at any time or times and at your absolute discretion to give further advances or overdrafts to the borrower whether with or without notice to us;
> (iv) any time given or extended to the borrower and/or any other security instruments guarantee or contract or any other indulgence granted to or compromise composition or arrangement made with the borrower and/or any other person or persons whether with or without consent or notice to us.

It seems to me that the words in the said section 3.01 'the borrower shall in addition to this agreement cause the following to be done ...', ie provide a second charge on the Klang lands and provide a letter of guarantee by the second defendant, read together with cl 3(i) of the guarantee put it beyond any argument that:

(i) the charge and the guarantee were in addition to the agreement to repay and not as a full and final recourse and indemnity;
(ii) that the guarantee was not simply ancillary to the second charge; and
(iii) that the plaintiff had not accepted the security in accord and satisfaction of the loan.

In my judgment, in the face of the said section 3.01 read together with cl 3(i) of the guarantee the said first part of the defence does not provide the defendants with any bona fide triable issue.

As to the second part of the proposed defence, contractually there is no impediment to the bank either suing for the debt or seeking to foreclose on the security or resorting to both those remedies. The fact of the matter is that apart from issuing the Form 16D notice the plaintiff has not pursued with foreclosure. Accordingly the harsh and unconscionable contention is misconceived. As to the complaint that the plaintiff had allowed the security to be lost there is cl 3(ii) of the guarantee by which the guarantor has expressly agreed that the neglect to enforce a security shall not affect the guarantor's liability to pay up on demand. The further fact of the matter is that the question of foreclosure proceedings by the plaintiff could not arise as the first chargee had in fact foreclosed on the property and as has been noted had obtained an order for sale on 26 March 1985. To contend

that the second charge had thereby lost the security is entirely without merit in the face of the terms of s 268 of the National Land Code which provides for the payment of moneys realized from a sale pursuant to a foreclosure action, inter alia, in respect of charges subsequent to the charge in respect of which there was foreclosure.

The application was dismissed with costs.

Application dismissed.

Solicitors: *Lim Kean Siew & Co; Shook Lin & Bok.*

Reported by *Ng Sheau Jiuan*

Public Prosecutor v Chan Kam Leong

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY CRIMINAL REVISION NO 53-19-86
ZAKARIA YATIM J
5 NOVEMBER 1988

Criminal Procedure – Accused detained and urine tests carried out under Drug Dependants (Treatment and Rehabilitation) Act 1983 – Whether Public Prosecutor can subsequently charge accused under Dangerous Drugs Act 1952 – Criminal Procedure Code (FMS Cap 6), s 376

Criminal Procedure – Magistrate not making orders after receiving accused's urine test conducted under Drug Dependants (Treatment and Rehabilitation) Act 1983 – Public Prosecutor subsequently charging accused under Dangerous Drugs Act 1952 – Whether same magistrate can sit to decide the charge

Criminal Law – Offence of self-administration of morphine under s 15(a) of the Dangerous Drugs Act 1952 – Elements of proof – Mere existence of drugs as confirmed in urine test not sufficient evidence for conviction – Dangerous Drugs Act 1952, s 15(a)

The accused was charged and convicted in the Magistrate's Court of an offence under s 15(a) of the Dangerous Drugs Act 1952, viz administering to himself a dangerous drug (morphine). The learned magistrate referred the following three questions to the High Court for its consideration:

(i) Whether a person detained under ss 3, 4 and 6 of Part 2 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 and where tests confirmed by a medical practitioner show that he is a drug dependant can be charged under s 15(a) of the Dangerous Drugs Act 1952 before production of the said persons before a magistrate as required under s 6(1) of the Drug Dependants (Treatment and Rehabilitation) Act 1983.

(ii) If the answer is in the affirmative: whether mere existence of drugs as confirmed in the urine test by a medical practitioner under s 6 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 is enough ground for charging or convicting a person for self-administration of a dangerous drug under s 15(a) of the Dangerous Drugs Act 1952.

(iii) If the answer is in the negative and the magistrate, after having regard to s 6(4), decides not to make the relevant orders under s 6(1)(a) or (b), and if the Public Prosecutor decides to charge the dependant under s 15(a) of the Dangerous Drugs Act 1952, whether the same magistrate can sit to decide the charge against the accused as the magistrate had already regard to the character and antecedents of the accused under s 6(4).

Held:

(1) Even if the accused was arrested under s 3 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 and the urine tests carried out under that Act showed that he was a drug dependant, this does not prevent the Public Prosecutor from charging the accused under s 15(a) of the Dangerous Drugs Act 1952. This is because under s 376 of the Criminal Procedure Code, the Public Prosecutor has the control and direction of all criminal prosecutions and proceedings. He has the power, exercisable at his discretion, to institute or conduct any proceedings for an offence, other than proceedings before a Syariah Court, Native Court or a court martial. The answer to the first question is therefore in the affirmative.

(2) In order to prove that a person is guilty of an offence under s 15(a) of the Dangerous Drugs Act 1952, the prosecution must prove: (i) the accused administered the drugs to himself, or the accused suffered another person, contrary to s 14 of the Act, to administer to him the dangerous drugs, and (ii) that the urine of the accused is clinically tested and found to contain the drugs. It is clear that the mere existence of drugs as confirmed in the urine test by a medical practitioner is not sufficient evidence to convict a person under the section.

(3) With regard to the third question, the answer is in the affirmative. However, it is desirable that another magistrate hears the case.

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 376
Dangerous Drugs Act 1952 s 15(a)
Drug Dependants (Treatment and Rehabilitation) Act 1983 ss 3, 6
Federal Constitution art 145(3)

KC Cheah for the accused.
Ahmad Rosli Mohd Sham (Deputy Public Prosecutor) for the Public Prosecutor.

Cur Adv Vult

Zakaria Yatim J: This case was referred by the learned magistrate to this court asking this court to exercise its power of revision in respect of a proceeding against an accused person under s 15(a) of the Dangerous Drugs Act 1952. In his application for revision he stated the following three questions for the consideration of the court:

(1) whether a person detained under ss 3, 4 and 6 of Part 2 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 and where tests confirmed by a medical practitioner show that he is a drug dependant can be charged under s 15(a) of the Dangerous Drugs Act 1952 before production of the said person